United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

75-4105

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-4105
75-4113
74-4118

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,

Petitioners and Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

TRT TELECOMMUNICATIONS CORPORATION,

Intervenor.

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P/S

BRIEF OF INTERVENOR TRT TELECOMMUNICATIONS CORPORATION

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BRIEF OF INTERVENOR TRT TELECOMMUNICATIONS CORPORATION

JURISDICTION

Petitioners in these consolidated proceedings invoke this Court's jurisdiction under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. §402(a), in order to seek review of a Memorandum Opinion and Order of the Federal

Communications Commission ("FCC"), released on June 6, 1975, 53 F.C.C. 2d 649. (A-1.)

STATEMENT OF QUESTION PRESENTED

Whether the FCC erred in determining that it would not summarily reject, without a hearing, the first carrier-initiated rate reduction in the international telex market in many years, solely on the claim of other carriers, opposing that reduction, that the calculation of off-peak hours on the basis of Eastern Time constituted an "unjust", "unreasonable", or "undue" preference or discrimination, within the meaning of Section 202(a) of the Communications Act, 47 U.S.C. §202(a), in favor of customers located outside the Eastern Time Zone because those customers had the lower off-peak rates available to them for from one to three hours earlier than Eastern Time Zone customers?[1/]

STATEMENT OF THE CASE

This case had its origins in a tariff filed at the FCC by TRT Telecommunications Corporation ("TRT") on March 24, 1975. On that date, TRT filed tariff sheets, effective May 1, 1975, which provided for a reduction in the rates for international telex service from the United States, on the one hand, to the United Kingdom

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1/ The tariff in question did not apply to transmissions originating in Alaska or Hawaii, so that only customers located in the Eastern, Central, Mountain and Pacific Time Zones were affected by it.

("UK") and the Federal Republic of Germany ("FRG"), on the other hand. Specifically, TRT proposed in its tariff to reduce, for an initial six-month experimental period (which has subsequently been extended for three more months), the $2.55 per minute charge, which at that time prevailed for all telex communications between the United States and the UK/FRG, to $2.00 per minute for "off-peak" periods, which TRT's tariff defined as the hours between 7 p.m. and 9 a.m. weekdays, and between 7 p.m. Friday and 9 a.m. Monday weekends, Eastern Standard or Eastern Daylight Time, as applicable. (A-10.)

Although TRT is by far the smallest of the four United States international record carriers ("IRCs")[2/] transmitting telex traffic between the United States and the UK/FRG,[3/] TRT's rate initiative represented the first instance in many years in which a US IRC had, at its own initiative, reduced telex rates in the trans-Atlantic market. As TRT explained in the letter accompanying its March 24 tariff filing, which it transmitted to the Chairman

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2/ IRCs are those carriers, like TRT and the three petitioners in this Court, which transmit primarily international telegram, telex and other hard-copy ("record") messages. The bulk of non-record international communications is transmitted by American Telephone & Telegraph Company, a so-called "voice carrier."

3/ As the FCC observed in its June 6, 1975 order (¶12 n.1,A-6):

> "In the case of the U.K., TRT has 11 telex circuits compared to 476 for other IRCs. TRT has 8 telex circuits to the FRG, compared to a total of 263 for the other IRCs."

of the FCC:

> "TRT's tariff filing . . . . clearly evidences a willingness by TRT to reevaluate the status quo in an attempt to provide improved service at reduced rates and to afford users a broader range of options determining how they may best meet their transatlantic communications needs." (A-9a.)

Despite its relatively small share of the UK/FRG telex market and the unwillingness of the much larger IRCs to undertake rate reductions in that market, TRT was able to cost-justify its experimental off-peak rate reductions. It did so on the basis of studies which showed that TRT's circuits with the Western Union Telegraph Company ("WUT"), the domestic record carrier with which TRT interconnects for the receipt and re-transmission of the vast majority of TRT's telex traffic to the UK/FRG, could be utilized at substantial cost savings to TRT during the specific off-peak hours identified in TRT's tariff. TRT also performed market studies which demonstrated that a significant percentage of its present telex customers would defer some of their US-UK/FRG telex traffic to the off-peak hours described in TRT's tariff, if a $.55 discount were offered to them as an incentive to do so.

The results of TRT's studies and the rationale for its tariff were placed before the FCC in a 21-page submission pursuant to Part 61 of the FCC's Rules, 47 C.F.R. §61.38. (A-16-36.)

TRT also pointed out that its decision to utilize the Eastern Time Zone for determining off-peak hours was based not only on the fact that TRT's circuits with WUT permitted cost

savings during those hours, but also was explained by the unacceptably high costs and technical complications which would have been presented by the necessity of programming TRT's telex computer, which is located in TRT's Miami gateway, to calculate off-peak telex rates on the basis of the location of each of TRT's customers within one of the four time zones within the Continental United States; much simpler programming was required for calculating those rates on the basis of a single time zone.[4/] (A-32; A-116.)

Shortly after TRT's tariff was filed, the three petitioners in this proceeding -- ITT World Communications Inc. ("ITT"), RCA Global Communications, Inc. ("RCA"), and Western Union International, Inc. ("WUI"), which together account for 95%-97% of the telex circuits operated between the United States and the UK/FRG,[5/] -- formally registered their opposition with the FCC to TRT's proposed rate reduction. ITT and WUI filed petitions to suspend and investigate that tariff, while WUI and RCA filed petitions to reject it.[6/] (A-37; A-49; A-69; A-89.)

4/ In addition to setting forth a full and complete rationale justifying its rates, TRT also undertook to continue market and other operational studies concerning customer use of TRT's off-peak service and to make the results of these studies available to the FCC's staff for its evaluation in determining the long-run implications of off-peak trans-Atlantic service. (A-33.)

5/ See p. 3 n. 3.

6/ WUI's two petitions were verbatim copies of one another, different only in caption and in the specific relief sought.

As correctly identified by the FCC in the order now under review, the primary thrust of the attacks made by the three large IRCs upon TRT's rate reduction was that it had been unilaterally put into effect by TRT "without joint study and consultation between the IRCs and their foreign correspondents. . . ."[7/] (Order ¶3; A-2.)

Along with many other defects which they perceived in TRT's tariff,[8/] ITT, RCA and WUI also each complained that TRT's tariff

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7/ Although stated variously, each of the carriers advanced this as its primary contention. Thus, ITT argued at page 6 of its Petition to Suspend:

> "Not only has TRT unilaterally departed from the U.S. position by proposing intercontinental 'off-peak' telex rates, but it is ITT Worldcom's understanding that it filed tariff revisions providing for such rates without prior consultation with the foreign administrations involved." (A-42.)

WUI similarly argued in the first page of its two petitions:

> "TRT's proposal for a reduced rate to United Kingdom and Germany during alleged off-peak hours ignores the industry-wide efforts at international cooperation and consultation." (A-49; A-69.)

RCA joined this chorus calling for "industry-wide" cooperation:

> "Under accepted principles of international communications practice applicable to both telex and telephone service, a new concept of service, which would have a far-reaching impact on the entire industry, should not be introduced without joint study and consultation between the U.S. carriers and their foreign correspondents." (RCA Petn. p. 2; A-90.)

8/ Among the many dire consequences which they predicted from the implementation of TRT's proposed rate reduction, the other IRCs

(continued)

unlawfully discriminated between customers situated in different time zones in the United States because TRT defined its off-peak hours solely by reference to Eastern Time.

TRT met, head on, all the criticisms made by its three competitors. As to their primary contention that TRT should not have made unilateral rate reduction, TRT pointed out that

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(fn. 8/ cont'd from p. 6)

predicted

(1) that no customers would be induced to use off-peak times for placing calls and that the reduction would simply lower rates to those people already using this service (RCA Petn.,pp 11-12; A-99-100)

(2) that TRT would be flooded with traffic during the off-peak hours immediately prior to the business day, thus causing congestion in the European telex network (WUI Petn., p.6; A-74)

(3) that a substantial number of customers would transmit calls to the UK/FRG for re-transmission to other European countries (WUI Petn., p.6; A-74)

(4) that in revenge for the congestion caused to their systems by TRT's reductions, the European administrations would establish off-peak hours for westbound traffic, thus congesting the US telex system (WUI Petn., p.8; A-76); and

(5) that the US balance of payments would be adversely affected (ITT Petn., p.6; A-42).

See TRT Reply to Petitions for Suspension and Opposition to Petitions for Rejection, dated April 25, 1975, answering these and all the other objections advanced by ITT, RCA and WUI with respect to TRT's tariff. (A-109; A-123.)

there was no rule, written, unwritten, or otherwise,which required TRT to secure the prior approval of its foreign correspondents and its competitors to plan rate initiatives. TRT pointed out that the adoption of such a rule would, as the other IRCs were well aware, virtually eliminate any possibility for price competition in the international telex market. (TRT Reply to Petitions to Suspend, p. 4; A-111.) TRT further pointed out that this attack by the other three carriers upon TRT's rate reduction was explained, not by their concern for international cooperation, but rather by their fear that TRT's unilateral rate reduction represented an impending break in the comfortable status quo from which those carriers had benefited in recent years with astronomical rates of return, e.g., for 1973 ITT 29.3% pre-tax, and RCA 20.1% pre-tax. (Id. at 3; A-110.)

As to the charge of unlawful discrimination between customers situated in different time zones, TRT pointed out that the claims of the other carriers arose solely out of the circumstance,which is present in most common carrier offerings, that some users were better situated than others to take advantage of the service. (Id. at 7; A-114.) TRT further pointed out that it had chosen the Eastern Time Zone for calculating its off-peak rates for the reasons which it had amply detailed in the materials accompanying its tariffs (see pp. 4-5, above) -- i.e., that TRT's traffic studies had shown it could realize lower costs in dealing with WUT and could alleviate congestion in the domestic

telex system during those, rather than some other, hours and that off-peak rates based upon the four different U.S.time zones would have required a substantial investment in computer programming. (Id. at 8 - 9; A-115-116.) 9/

After receiving the copious submissions of all the parties concerning TRT's proposed rate reduction, the FCC entered its order of June 6, 1975, which is the subject of the pending petitions to review. Fully discussing the arguments advanced by the petitioners here attacking the tariff and the counter arguments made by TRT (¶¶3-11; A-2-5), the FCC concluded that it would not reject TRT's tariff filing. With respect to the claim that TRT should not have acted unilaterally in reducing rates, the Commission held that no responsible international group had taken a position binding upon the FCC with respect to off-peak rates and that

> "the public interest will be served by allowing the proposed experiment in order to assist us in the execution of our responsibility to ensure that the public has available a 'rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges' (Section 1 of the Act)." (¶14; A-7.)

9/ Specifically the time zones associated with each of the many thousand potential telex customers would have to be determined and inputted into TRT's billing computer's memory . (Id. at 9; A-116.)

The Commission also observed in this regard that it had

> "a general policy of encouraging competitive carriers to undertake new and innovative service offerings that will afford users a wider choice of options "

and that, accordingly, TRT's rate reduction represented "an appropriate manner in which to explore the implications for the public and other interested entities" of the off-peak rate structure proposed by TRT. (Order ¶12; A-6.)

With respect to the claims of discrimination made by the other IRCs before the FCC and now advanced in this Court, the FCC concluded that TRT's use of the Eastern Time Zone for calculating off-peak hours

> "is reasonable for the purposes of the experiment in view of TRT's representation as to its traffic patterns." (Order ¶15; A-7.)

The Commission further concluded that it would not be worthwhile in the circumstances to require TRT to reprogram its computers to offer off-peak rates on a local time basis. (Ibid.)

Abandoning the principal tack which they took before the FCC -- i.e., the challenge to TRT's right to reduce rates unilaterally -- ITT, RCA and WUI now focus exclusively upon the discrimination issue in an attempt to have this Court compel the FCC summarily to reject TRT's rate reduction without a hearing.[10/]

10/ Although ITT devotes a substantial section of its brief to the manner in which the FCC dealt with the efforts of ITT, RCA and WUI to file matching tariffs responding to TRT's

(continued)

ARGUMENT

The argument advanced by ITT, which has been joined by both RCA and WUI, is easily stated and just as easily refuted. ITT contends (1) that TRT's off-peak telex rate discriminated against customers located in the Eastern Time Zone since the definition of off-peak hours was based on Eastern Time and therefore commenced at a later hour in the East than it did for other time zones in the United States; (2) that Section 202(a) of the Communications Act constitutes an "absolute statutory prohibition of discrimination" (ITT Br. 25); and (3) that the FCC was, therefore, compelled, as a matter of law,summarily to reject TRT's tariff without a hearing.

None of the three basic premises of ITT's argument will withstand analysis: (a) the tariff has not been shown to be discriminatory; (b) even if it were, it would not necessarily violate

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(fn. 10/ cont'd from p. 10)

rate reduction (ITT Br. 4-11), ITT now admits that that issue is "moot" (ITT Br. 11), and TRT sees no justification for further burdening the Court with a lengthy refutation of ITT's contentions on this point. Suffice it to say that the other IRCs attempted to meet TRT's rate reduction without undertaking any analysis of their costs, traffic patterns, or the like, and sought to implement their tariffs in less than the 30-day period prescribed by the FCC's Rules. See 47 U.S.C. §203(b). The FCC refused to waive its regular tariff-filing requirements in this regard, but allowed the other IRCs to put their tariffs into effect after the prescribed 30-day period. Thus, as a result of TRT's rate reduction initiative, which after an initial 30-day suspension became effective on May 31, 1975, (A-133), customers of all four IRCs have been able to enjoy off-peak telex rates from the US to UK/FRG since July 1, 1975.

Section 202(a), since it bars only "unjust," "unreasonable," or "undue" discrimination; and, (c) in any event, the FCC's rejection power does not extend to the invalidation of tariffs which are attacked on the ground that they violate Section 202(a). 11/

I. TRT's Tariff Has Not Been Shown to be Discriminatory

The argument that TRT's off-peak tariff is discriminatory rests upon ITT's bare assertion that "West Coast businesses necessarily obtain a competitive advantage over their East Coast rivals" by virtue of being able to utilize TRT's off-peak rates beginning at 4 p.m., whereas businesses located in the Eastern

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11/ Preliminarily, we note another basic defect in ITT's legal position in this Court: Although complaining only of the FCC's refusal to reject TRT's off-peak telex tariff, ITT did not ask the FCC to reject that tariff. Instead, ITT sought only a three-month suspension of the tariff and a hearing into its lawfulness. See Section 204 of the Communications Act, 47 U.S.C. §204. (The FCC's refusal to suspend TRT's tariff is, under settled law, not reviewable in this or in any other Court. Arrow Transportation Co. v. Southern Ry., 372 U.S. 658 (1963); United States v. S.C.R.A.P., 412 U.S. 669 (1973)).

ITT's failure to seek rejection below bars it, under Section 405 of the Act, 47 U.S C. §405, from seeking judicial review of the FCC's refusal to reject TRT's tariff. See W.H. Hansen v. FCC, 413 F.2d 374, 376 (D.C.Cir. 1969); Conley Electronics Corp. v. FCC, 396 F.2d 620, 624 (10th Cir), cert. denied, 393 U.S. 858 (1968). See also Gross v. FCC, 480 F.2d 1288, 1291 n. 5 (2d Cir. 1973). However, since WUI and RCA join in ITT's brief in this Court, and since they did seek rejection below, we will respond to the arguments advanced in ITT's brief, notwithstanding the fact that ITT has no standing of its own to pursue them here.

Time Zone must wait until 7 p.m. to transmit traffic at TRT's off-peak rate. (ITT Br. 16.)

This proposition is supported by nothing other than the assertion made by ITT's counsel in this Court; there is nothing whatever in the record to support it. To be sure, East Coast communications users may not take advantage of the off-peak rates until 7 p.m., whereas West Coast businesses can begin transmitting traffic at off-peak rates at 4 p.m. However, by the same token, an East Coast communication user has the benefit of the off-peak rates until 9 a.m., whereas West Coast businesses lose access to those rates at 6 a.m. It is by no means obvious that a West Coast customer's access to off-peak rates during the 4-7 p.m. period in the afternoon offsets the advantage realized by an East Coast customer in having access to off-peak rates during the three hours immediately preceding 9 a.m. Indeed, since the 6 a.m. - 9 a.m. Eastern Time period when off-peak rates are available in the East falls in the middle of the business day in western Europe (11 a.m. - 2 p.m. in the UK; noon - 3 p.m. in FRG), it could well be argued that the calculation of off-peak rates on an Eastern Time Zone basis gives East Coast customers an undue advantage over West Coast customers.[12/]

12/ In fact, WUI, which has filed a memorandum joining in ITT's brief, made precisely this point in its petition to reject TRT's tariff:

> "TRT's weekday 'off-peak' hours begin at 7 P.M. and end at 9 A.M. U.S. Eastern time, which in

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We confess that we do not know whether it is better to have off-peak rates for three more hours in the morning or three more hours in the afternoon,at either end of the business day. The point is, TRT's off-peak tariff makes its reduced rates available to all US communications users for 14 hours a day (24 hours weekends), and whether the habits of a particular user make these rates relatively more accessible to him than to someone else relates to his communications arrangements, regular time of business, and other matters beyond the control of TRT or any other carrier.

Clearly then, ITT cannot sustain its position in this Court by claiming that TRT has developed a "discriminatory rate structure" and then by merely asserting that it is discriminatory. Absent any evidence in the record below concerning the differential impact of the rate upon businesses situated in different time zones and absent any showing that TRT could have developed a tariff to deal with those impacts, ITT and the other IRCs must be held to have failed to show that there was <u>any</u> discrimination inherent

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(fn. 12/ cont'd from p. 13)

> the United Kingdom corresponds to 12 Midnight 2 P.M. and in Germany 1 A.M. to 3 P.M. Many U.S. telex users might be encouraged by the reduced rates to shift substantial amounts of traffic to the two hour time segment just prior to the end of TRT's off-peak schedule. Transmission within this time span would be received in the United Kingdom between noon and 2 P.M.,and in Germany between 1 P.M. and 3 P.M." (WUI Petition,pp. 5-6; A-73-74.)

in TRT's tariff.[13/]

II. Section 202(a) Does Not Constitute an Absolute Bar to All Discriminatory Communications Common Carrier Tariffs.

We have shown in Part I above that the other IRCs have not met their burden of demonstrating that TRT's tariff was discriminatory. But even assuming that they had made such a showing, they would by no means have demonstrated that TRT's tariff was violative of Section 202(a) of the Communications Act. For notwithstanding ITT's repeated assertions that Section 202(a) bars all discrimination (ITT Br. 15, 23, 24, 25), the section proscribes only "unjust," "unreasonable," or "undue" discrimination:

> "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." (Emphasis supplied.)

13/ For the same reason, ITT and the other IRCs failed to carry their burden of establishing injury to TRT's customers in the manner required to attack a tariff that is alleged to be unlawfully discriminatory. See Shaw Warehouse Co. v. Southern Ry., 288 F.2d 759, 767 (5th Cir. 1961), cert. denied, 369 U.S. 850 (1962); Chamber of Commerce of Fargo, N D. v. United States, 276 F.Supp. 301, 309 (D.N.D. 1967).

ITT cites American Trucking Associations v. FCC 377 F.2d 121, 130 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967), for the proposition that the statute does not mean what it says and that, instead, its prohibition of discrimination "is categorical and admits of no exception." (ITT Br. 15.) That case stands for no such proposition.

In American Trucking, the court had before it an FCC order which involved four undisputedly discriminatory service offerings of a communications carrier. The FCC had ruled, after a full hearing, that two of those offerings violated Section 202(a), but that two others did not because they were justified under the circumstances explored in the FCC's hearing and were therefore not unjustly, unreasonably or unduly discriminatory within the meaning of Section 202(a). The court in American Trucking affirmed the FCC's order and did not question the FCC's determination as to the two discriminatory tariffs which it upheld. In the light of this disposition, the court in that case could not have embraced the view of the statute, now put forward by ITT, that Section 202(a) categorically prohibits all discriminations.

The language of the American Trucking case quoted by ITT (ITT Br. 15) is, therefore, dicta inconsistent with the result in that case and can furnish no support for ITT's position here. The fact is, the D.C. Circuit subsequently held, in upholding an FCC order which refused to strike down a tariff alleged to be discriminatory, that

> "Not every variation in prices charged customers for a particular feature of the carrier's service supports a claim of unlawful discrimination. 85/ Since rate classifications no less than other classifications may be justified by differences between classes, the mere existence of a disparity between particular rates does not establish a statutory violation.
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> ---
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> 85/ See e.g. General Tel. Co. of the Southwest v. Robinson, 132 F. Supp. 39, 44 (E.D. Ark. 1955). In the statutory language, only 'unjust or unreasonable' discriminations and 'undue or unreasonable' preferences and prejudices have that effect."

Associated Press v. FCC, 452 F.2d 1290, 1300 (D.C. Cir. 1971).[14/]

If more evidence is needed of the error in ITT's construction of Section 202(a), cases decided under the anti-discrimination provisions of the Interstate Commerce Act, Sections 2 and 3(1), 49 U.S.C. §§2, 3(1), provide it.[15/] From the beginning,

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14/ This Court too has recently had occasion to deal with FCC orders involving concededly discriminatory rates where the issue was whether that discrimination was unreasonable, unjust or undue in the light of the factual circumstances underlying the carrier's tariff. American Telephone & Telegraph Co. v. FCC, 449 F.2d 439 (2d Cir. 1971).

15/ Section 202(a) of the Communications Act was taken from Sections 2 and 3(1) of the Interstate Commerce Act, 49 U.S.C. §§ 2 and 3(1), with the intention that there would be no difference in substance between the two acts. See S. Rep. No. 781, 73d Cong. 2d Sess. p. 4 (1934); H.R. Rep. No. 1850, 73d Cong. 2d Sess. p. 5 (1934); 78 Cong. Rec. 8824, 10313 (1934). Thus, Section 202(a) of the Communications Act should be construed in pari materia with Sections 2 and 3(1) of the Interstate Commerce Act. See Stanley v. Western Union Tel. Co., 23 F. Supp. 674, 675 (S.D.Fla. 1938); Curran v. Mackay Radio & Tel. Co., 123 F. Supp. 83, 89 (S.D. N.Y. 1954). Cf. ICC v. Parker Motor Freight, 326 U.S. 60, 65 (1945).

(continued)

courts have interpreted the anti-discrimination provisions of the Interstate Commerce Act as not barring all discrimination. See ICC v. Baltimore & O.R.R., 145 U.S. 263, 276 (1892), where, although identifying the prohibition of discrimination and preferences as among the principal objects of the Interstate Commerce Act, the Court declared that

> "it is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable."

This construction of the Act is as valid today as it was when first rendered. See National Gypsum Co. v. United States, 353 F. Supp. 941, 946 (W.D.N.Y. 1973) (Mansfield, Cir. J.); Chamber of Commerce of Fargo N.D. v. United States, 276 F. Supp. 301, 308 (D.N.D. 1967); State Corp. Comm'n of Kansas v. United States, 184 F. Supp. 691, 696-97 (D.Kan. 1959). See also United States v. Illinois Central R.R., 263 U.S. 515, 521 (1924).

Reference to decisions under Sections 2 and 3(1) also highlights the factual issues which would have to be resolved prior to any determination of the lawfulness, under Section 202(a), of TRT's allegedly discriminatory tariff. TRT made it clear in the materials which it filed at the FCC in support of its tariff

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(fn. 15/ cont'd from p. 17)

> Moreover, while varying slightly in terms, Sections 2 and 3(1) "are plainly complementary and to be read in pari materia" with one another. Atchison, T. & S.F. Ry. v. United States, 244 F. Supp. 955, 962 (N.D.Ill. 1965), rev'd sub nom. on other grounds, 387 U.S. 397 (1967).

that it had selected the 7 p.m. - 9 a.m. Eastern Time period as an appropriate one for offering off-peak rates in the light of two factors: (1) TRT traffic studies which showed that TRT incurred less costs in exchanging traffic with WUT during those hours; and (2) the prohibitorily high costs involved in programming TRT's computer to measure telex rates based upon local time. 16/

16/ The other IRCs have themselves admitted in the materials which they filed in support of their own off-peak tariffs that programming telex computers to measure rates based on local time would involve unreasonably high costs:

> "ITT Worldcom could reprogram its billing computers to offer off-peak telex rates based on local time at point of origin. But extensive computer reprogramming would be involved. At this time ITT Worldcom cannot make an estimate as to the cost of such a reprogramming effort." (ITT Amended App. No. 885, June 10, 1975, p. 2; (A-141.)
>
> * * * *
>
> "[I]t appears that RCA Globcom will incur nominal costs of approximately $2000 to effect the necessary operating changes required in order to properly identify and bill calls which are placed during off-peak hours, eastern time. While we have not been able to fix a specific dollar price, it is clear that the costs involved to reprogram our computer to recognize local times would be substantially greater. More important, however, is the fact that while the changes required in order to compete with TRT can be accomplished in a short time, a major programming change would take over a month . . . ." (RCA App. No. 1332, June 10, 1975, p. 3; A-150.)
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> * * * *
>
> "The Bureau Staff has requested comments on the feasibility of applying off-peak rates based on the local time at the point of origin rather than on Eastern Time. This would require revamping of the answerback master file. This master file consists of the answerbacks of those customers who have utilized the WUI Telex System . . .

Such cost considerations have frequently been held to justify even admittedly discriminatory tariffs. See, e.g., Atchison, T. & S.F. Ry. v. United States, 218 F. Supp. 359, 367 (N.D.Ill. 1963); Central & So. Motor Frgt. Tar. Ass'n v. United States, 273 F. Supp. 823, 827 (D.Del. 1967). In refusing to reject TRT's tariff the FCC, therefore, properly recognized that the cost considerations relied upon by TRT might well justify its reference to Eastern Time as the basis for calculating off-peak rates. (¶15; A-7.)

The courts have also recognized the obligation of regulatory agencies to examine public interest considerations in determining the lawfulness of rates alleged to be unduly discriminatory. See, e.g., Koppers Company, Inc. v. United States,

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(fn. 16/ cont'd from p. 19)

> "Each of the answerbacks in this master file would have to be identified as to the time zone the telex machine is located in . . .
>
> "The file would require additional continual maintenance for changes in addresses and answerbacks and deletions and additions of telex machines . . .
>
> "One major problem that would occur in applying rates based on local times would relate to calls which are initially unidentifiable as to the party making the call . . . . Under a local time rate application, calls that were unidentified during the month could not be abstracted for revenue purposes until the origin of the machine or customer could be determined." (WUI Amended App. No. 556, June 10, 1975, p. 2; A-144.)

166 F. Supp. 96, 103 (W.D.Pa. 1958), where the court in passing on issues raised under Sections 2 and 3(1) of the Interstate Commerce Act declared that it was the ICC's

> "duty . . . to consider not only the wishes and interests of the shippers and merchants, but to also consider the desire and advantage of the carrier, the interest of the public, and competitive factors . . . ."

See also, Eastern-Central Ass'n v. United States, 321 U.S. 194, 206 (1944).[17/] Here, the public interest considerations supporting TRT's tariff were overwhelming. TRT's off-peak rate reduction represented the first instance in many years in which any IRC had voluntarily reduced its telex rates. Thus, even assuming there were marginally discriminatory aspects of the tariff in the manner identified by the other IRCs, the FCC properly considered the interest of the public in receiving reduced rates when it refused to reject TRT's tariff on the basis of its allegedly discriminatory provisions.

In the light of all the above, it is clear that even if ITT and the other IRCs had identified some discriminatory aspects in TRT's tariff in their petitions to reject (which, as we demonstrated in Part I, they did not do) they have not shown that the tariff was unlawful under Section 202(a) of the Communications Act.

17/ In the Eastern-Central Ass'n's case, the Court referred to ICC's obligation to consider national transportation policy as declared by Congress in passing upon discriminatory rates. The FCC fulfilled its similar obligation here by grounding its refusal to reject TRT's tariff, at least in part, upon its recognition of its obligation under Section 1 of the Communications Act to "ensure that the public has available a 'rapid, efficient . . . worldwide . . . communications service . . . at reasonable charges.'" (Order ¶14; A-7.)

III. The FCC Was Without Authority To Reject TRT's Tariffs Under The Claims Of Discrimination Made By ITT And The Other IRCs.

ITT's error as to the construction of Section 202(a) of the Communications Act wholly vitiates the underlying assumption in its brief (which is nowhere explicitly defended) that the FCC had authority under the Communications Act to reject TRT's tariffs. The FCC had no authority to reject TRT's tariff upon the grounds now advanced by ITT in this Court, and the FCC cannot, therefore, be reversed for refusing to take such action.[18/]

We know of no better way of beginning our argument on this point than by quoting from the recent opinion of this Court, which sets forth clearly and succinctly the overall plan of the Communications Act with respect to common carrier rate-making:

18/ The FCC did have authority under Section 204 of the Act, 47 U.S.C. § 204, to suspend and investigate TRT's tariff. And in its June 6 order the FCC did deny ITT's and WUI's petitions for suspension and investigation of the tariff. That action, however, has not been attacked by ITT, WUI, or RCA. In their petitions for review in these three actions, these three IRCs complain only of the FCC's refusal to reject TRT's tariff; there is no mention in any of those petitions of its refusal to suspend and investigate the TRT's tariffs.

As pointed out above (p. 12, n. 11), the FCC's refusal to suspend TRT's tariff is not reviewable in this Court, and this may explain the IRCs' failure to complain of the FCC's denial of their suspension petitions. Moreover, had the IRCs desired that the FCC conduct an investigation into the lawfulness of TRT's (and, after July 1, 1975, their own) off-peak rates, they had remedies available to them, which they have not invoked, beyond seeking judicial review in this Court of the FCC's refusal to investigate TRT's rates. See Sections 206-08 of the Communications Act, 47 U.S.C. §§ 206-08.

> "The Communications Act of 1934, 47 U.S.C. §151 et seq. (1970), does not require carriers to obtain the approval of the Commission before making changes in their rates. Carriers may initiate rate changes by filing new tariffs with the Commission. Section 203. Such rates may become effective after a specified notice period. Id. The Commission may investigate the lawfulness of newly filed rates and suspend their effectiveness for up to three months. Section 204. After this three month period, the rates shall become effective by operation of law pending the outcome of the investigation. Id. . . . In addition, after a full investigation and hearing, the Commission has the authority to determine the lawfulness of either newly filed or previously established rates and in certain instances to prescribe new rates. Section 205." American Telephone & Telegraph Co. v. FCC, 487 F.2d 865, 871-72 (2d Cir. 1973). (Footnotes omitted, emphasis supplied.)

The Court then properly perceived that:

> "In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. The balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance." 487 F.2d at 880.

In entertaining attacks upon the reasonableness of rights, whether on the claim that they are unreasonably high or unreasonably discriminatory, the FCC's power is, as this Court properly perceived, limited. It may suspend the rates for up to three months and investigate them. It may then hold a full investigation and hearing to determine their lawfulness, but in the meanwhile, the rates are to be allowed to go into effect after the prescribed three-month statutory suspension.

ITT seeks relief in this Court in the form of an order that would direct the FCC to reject summarily, without any hearing,

the tariff filed by TRT on the ground that it is unduly, unjustly or unreasonably discriminatory in violation of Section 202(a). Obviously, if the FCC granted such summary relief, either on its own motion or pursuant to the direction of a court, the delicate balance identified by this Court in describing the scheme of the Communications Act would be upset. For the FCC would in so doing have acted summarily upon a challenge to the tariff without affording a hearing to the carrier (or for that matter to customers supporting the tariff) to show that the tariff is lawful. Every relevant judicial authority on the subject bars this approach to the Communications Act.

In the first place, this Court itself, in the very opinion that articulated the regulatory scheme set forth above, described the FCC's rejection power as extending to a tariff that is "demonstrably unlawful on its face -- e.g., one that conflicts with the statute." 487 F.2d at 880 n. 33.

In so holding, the Court properly relied upon Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971). There, the court was confronted by claims, much like those made by ITT here, that the FCC should have decided without a hearing issues concerning the lawfulness of rates proposed in a carrier's tariff. The court unequivocally rejected that contention:

> "Whether the AT&T rates in general or the TELPAK rates in particular are too high is a matter for the Commission to decide after investigation and hearing. The Commission has no authority to reject rates summarily on the ground that they are unlawfully high.

> By the same token this court has no authority to invade the province of the Commission by ordering it to reject a rate without a hearing, on the ground that it is unlawfully high." 448 F.2d at 1104. (Citations omitted, emphasis supplied.)

See also, North Carolina Natural Gas Corp. v. United States, 200 F. Supp. 745, 750 (D.Del. 1961). Cf. Willmut Gas & Oil Co. v. FPC, 294 F.2d 245 (D.C.Cir. 1961), cert. denied, 368 U.S. 975 (1962).

The same considerations which prohibit the FCC and other regulatory agencies from rejecting a tariff on the ground that the rates are unreasonably high operate to prevent them from rejecting a tariff on the ground that it is unreasonably discriminatory; in both instances, the issue is one that cannot be determined on the face of the tariff alone, but rather requires an investigation and hearing by the agency. As the Supreme Court held in Board of Trade v. United States, 314 U.S. 535, 546 (1942):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission . . . ." 19/

Indeed, the Court in Board of Trade went on to declare that one of the few circumstances in which agency's determination as to that issue could be set aside would be where it was made

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19/ See also, Stanislaus County v. United States, 236 F. Supp. 146, 148 (N.D.Cal. 1964).

without a hearing (Id. at 546), the very relief which ITT claims should have been afforded to it below.

Obviously, the many issues which would have to be considered by the FCC in the context of determining the lawfulness of TRT's rates -- TRT's cost justification, public interest considerations, impact upon communications users, and the like -- could not properly be resolved without a hearing. ITT and the other IRCs claims that the FCC should have summarily determined those issues against TRT,and thereby should have rejected its tariff,are wholly misconceived.

In the light of the error in its underlying assumption that the FCC possessed authority to reject TRT's tariff on the grounds advanced by ITT and the other IRCs below, little need be said in response to ITT's argument that the FCC applied erroneous standards in determining whether to reject that tariff. However, it should be noted that ITT's reliance upon the Administrative Procedure Act (ITT Br. p.20) and upon cases concerning the requirement which that Act imposes upon the FCC's rendition of final judgments (ITT Br. p.21 & n.n.) rests upon another equally erroneous assumption.

ITT assumes that the FCC in its June 6 order determined the lawfulness of TRT's rates, and that it did so without an adequate statement of its rationale. The fact is, a refusal to reject a tariff has no legal consequences apart from its effect upon the timing of the rate change. The FCC did not here purport to determine that the rates contained in TRT's tariff were, in fact, just and reasonable within the meaning of the Communications Act.

It merely held that the rates would not be rejected or suspended. That holding still permits ITT, RCA, WUI, or any other party affected by the rates to invoke the processes of the FCC to determine the lawfulness of TRT's rates. See Section 206-08 of the Act, 47 U.S.C. §§ 206-08. Thus, the FCC's refusal to reject TRT's tariff did not finally determine any substantive issues affecting the petitioners, and accordingly, the defects which ITT now perceives in the FCC's June 6, order, even assuming they exist , do not furnish any basis for a judicial attack upon that order.[20/]

20/ Finally, we note the argument advanced by RCA as its contribution to petitioner's efforts in this case -- that the FCC should have rejected TRT's tariffs in the light of cases and statutory authorities concededly rendered "in contexts different from the one now before the Court." (RCA Br. 10.)

In the first place, RCA failed to advance this argument below; the petition which it filed in opposition to TRT's tariff contained nothing even hinting at the argument which RCA now raises. Under Section 405 of the Act, RCA's failure to raise these contentions below bars it from relying upon them in this Court. Presque Isle T.V. Co. v. United States, 387 F.2d 502,505-06 (1st Cir. 1967); cf. Cornell University v. United States, 427 F.2d 680, 684 (2d Cir. 1970).

Even if this Court could properly consider RCA's argument, it rests upon cases which, as RCA's own description of them shows, are so remote from the present case as to be irrelevant to any issue raised by TRT's tariff. Moreover, RCA's argument turns entirely upon its assertion that these authorities demonstrated the FCC's "imperative duty, imposed by the Communications Act to proscribe tariffs which are, in fact, unreasonably discriminatory." (RCA Br. 15). Whatever the force of such a contention in a context where the FCC has held a hearing into the lawfulness of allegedly discriminatory rates, it cannot support summary rejection of a tariff.

CONCLUSION

For all the reasons stated above, the FCC's order of June 6, 1975 was correct and this Court should refuse to set it aside.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-4105
75-4113
75-4118

ITT WORLD COMMUNICATIONS INC.,
RCA GLOBAL COMMUNICATIONS, INC.,
and WESTERN UNION INTERNATIONAL, INC.,

Petitioners and Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

TRT TELECOMMUNICATIONS CORPORATION,

Intervenor.

CERTIFICATE OF SERVICE

I, E.Edward Bruce, a member of the bar of this Court, hereby certify that copies of the Brief for Intervenor TRT Telecommunications Corporation, were this 24th day of January, 1976, served upon the following persons, first class mail, postage prepaid:

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